

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

YVONNE E. VANCE

PLAINTIFF

V.

NO. 3:95CV154-B-B

UNION PLANTERS CORPORATION, ET AL.

DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the defendants' objection to and appeal from the United States Magistrate Judge's January 8, 1997 order and the plaintiff's Rule 56(f) motion for continuance. The court has duly considered the parties' memoranda and exhibits and is ready to rule on both matters.

I. Magistrate Judge's Order

The defendants appeal from and object to the magistrate judge's January 8, 1997 ruling on the motion to compel filed by the plaintiff on December 24, 1996. The plaintiff moved to compel the defendants to respond to interrogatories, requests for production of documents and subpoenas duces tecum served on November 5, 1996. On November 12, 1996 the defendants filed a motion for a protective order and extension of the deadline for completion of discovery. On November 14, 1996 the magistrate judge granted the motion, continuing depositions scheduled by the plaintiff between November 19 and 22, 1996 and extending the deadline for completion of discovery through and until January 23, 1997. On November 15, 1996 the defendants served objections to the subpoenas duces tecum for the depositions which had been continued by the magistrate judge. On December 5, 1996, the defendants responded to the plaintiff's

interrogatories and requests for production and asserted numerous objections¹ on the grounds of relevance, undue burden and sensitive information. On December 18, 1996 the plaintiff's counsel served defense counsel via facsimile a fifteen-page letter setting forth detailed, fact-based reasons for her discovery and production requests. The letter states in part:

Please advise me as to whether your clients will produce these documents as soon as possible. If I do not hear from you before 12:00 noon on Monday, December 23, 1996, I will proceed to file a motion and set it for a hearing as soon as possible.

The plaintiff asserts that the deadline for **service** of written discovery requests was December 23, 1996.² Having received no response from the defendants, the plaintiff filed a motion to compel on December 24, 1996. The magistrate judge's January 8, 1997 ruling states in part: "[T]he court is of the opinion that it should be granted in large part and denied in other particulars."

The court finds that the defendants' appeal, to the extent it pertains to the specified documents and information the magistrate judge ordered to be produced, is moot. The defense counsel advised the court in a letter dated January 30, 1997 that the remaining

¹The discovery responses incorporate objections raised in the defendants' November 15, 1996 response to the subpoenas duces tecum which repeatedly asserts: "We object to this production because it is not relevant nor will it lead to relevant admissible evidence. We also object because plaintiff is now employed by a competitor bank in this market area, and this is sensitive information."

²See Fed. R. Civ. P. 33(b)(3) and 34(b) (requiring service of a written response within 30 days).

documents to be produced were the following: (1) FDIC and State audits of certain bank entities and (2) a list of presidents and branch managers of Union Planters Corporation [UPC] subsidiary banks during the eighteen months preceding the merger. The defendants assert³ that the plaintiffs are in possession of the State audits and that the ordered FDIC documents have been submitted to FDIC counsel "for review of compliance with its disclosure requirements," and upon FDIC's approval, will be promptly produced. The defendants further assert that upon the plaintiff's suggestion they have submitted to the plaintiff a proposed stipulation providing that "all existing records of presidents and branch managers of UPC and its subsidiaries have been produced."

The magistrate judge's award of sanctions in the January 8, 1997 order is the only remaining issue raised in the defendants' appeal. The magistrate judge awarded to the plaintiff 75% of her reasonable expenses, including attorneys fees, "incurred as a consequence of being required to file the instant motion to obtain the requested information," in accordance with the provisions of Rule 37(a)(4) of the Federal Rules of Civil Procedure. Rule 37(a)(4)(C) provides:

If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses

³The defendants' update of the status of the court-ordered production is found in their response to the plaintiffs' motion for Rule 56(f) continuance.

incurred in relation to the motion among the parties and persons in a just manner.

The 75% award is consistent with the magistrate judge's limiting the scope of some of the interrogatories and requests for production in dispute. Rule 6(c)(1) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi requires the filing of a Good Faith Certificate signed by all counsel with all discovery motions. Rule 6(c)(1) further provides that the moving party may request appropriate sanctions "[i]f a party fails to cooperate in the attempt to resolve a discovery dispute or prepare the Good Faith Certificate."

The defendant's attorney did not sign the Good Faith Certificate prepared and forwarded by the plaintiff's attorney via facsimile. The defendants complain that the plaintiff responded to their objections one month after the defendants objected to the subpoenas duces tecum and thirteen days after they objected to the interrogatories and requests for production. The court finds that there was no reason to respond to the defendants' objections to the subpoenas duces tecum while the plaintiff awaited responses to similar requests for production, particularly since the scheduled depositions had been continued. The plaintiff asserts that within one week of receipt of the defendants' discovery responses and objections, her attorney advised the defense counsel in a phone conference that he intended to respond to each of the discovery objections. The plaintiff's December 18, 1996 letter consists of fifteen pages explaining in detail what the plaintiff expected the

requested information and documents to establish. In addition, the plaintiff narrowed the scope of certain requests. The defendants complain that they had only five calendar days (three working days) to respond before the motion to compel was filed.

The court finds that the defendants had adequate time to informally respond by phone or facsimile to, at least, indicate whether they were willing to confer in an attempt "to determine to what extent the issue[s] in question [could] be resolved." Local Rule 6(c)(1). In addition, prior to the December 18 letter, the defendants were put on notice of the plaintiff's intent to respond to their objections. The court further finds that the timing of the plaintiff's motion to compel was reasonably based on the deadline for **completion** of discovery. Since the defendants's initial objections were general and conclusory and the defendants wholly failed to even attempt to confer in good faith prior to the filing of the motion to compel⁴ and prior to the deadline for submission of written discovery requests, the court finds that the sanction imposed by the magistrate judge was reasonable and does not constitute an abuse of discretion.

The defendants further contend that the three-day deadline to produce court-ordered documents and information was "an additional unjustified sanction." The magistrate judge ordered in part "[t]hat defendants make available for inspection and copying the documents and information ordered produced above no later than

⁴As noted supra, the defendants ignored the Good Faith Certificate furnished by the plaintiff.

Monday, January 13, 1997." At the time of the ruling, the plaintiff's deposition was set for January 15, 1997. On January 15, 1997 the magistrate judge continued the plaintiff's deposition⁵ on the ground that the defendants had not fully complied with the January 8, 1997 order. The magistrate judge explained: "A substantial motivation for the court's January 8 order was to provide the plaintiff with relevant documents **before** she submits to her deposition." Clearly, the court-imposed time frame was necessary under the circumstances on January 8, 1997. The defendants assert that they needed additional time to research, retrieve, organize and copy the requested information and documents. The court notes that the defendants were ordered only to "**make available for inspection and copying** the documents and information ordered produced." See January 8, 1997 order (emphasis added). In any event, the defendants have, in effect, been allowed an extension to date for their compliance with the January 8 order.

The defense counsel's January 9, 1997 letter to the plaintiff's counsel states in part: "If it is impossible to secure certain documents within the time frame [set by the court], we are going to file an appeal as to the production of those documents." If the time constraint was the primary basis of the defendants' objections, the defendants should have requested additional time prior to the December 5, 1996 deadline to respond

⁵At the time of the January 15, 1997 order, the plaintiff's deposition had been reset to January 16 by agreement of the parties.

to the discovery requests or prior to the filing of the plaintiff's motion to compel. Upon due consideration, the court finds that the magistrate judge's January 8, 1997 order is neither clearly erroneous nor contrary to law.

II. Plaintiff's Rule 56(f) Motion

The defendants have filed a motion for summary judgment asserting, **inter alia**, that UPC was not the plaintiff's employer for purposes of Title VII and that United Southern Bank and Sunburst Bank cannot be liable for the Title VII refusal to hire claim on the ground that the plaintiff did not apply for a position with either of them. The plaintiff seeks a continuance of the summary judgment proceeding since no depositions have been conducted. Rule 56(f) of the Federal Rules of Civil Procedure provides:

When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The plaintiff asserts through an affidavit, attesting to the truth of the motion and supporting memorandum, that she is unable to oppose the summary judgment motion by affidavit without deposing the defendants and defense witnesses. The defendants contend that, in light of the information and documents in the plaintiff's possession, the plaintiff should be required to respond to the

motion in order to justify the expense of depositions. The court finds that the plaintiff adequately explains the need for depositions to confirm the relationships among the bank entities for the purpose of proving the existence of an integrated enterprise. No depositions have been conducted, as a result of discovery disputes and extensions. The magistrate judge has ordered that the plaintiff be deposed prior to the taking of any depositions of the defendants. However, the delay in the court-ordered production by the defendants has postponed the plaintiff's deposition.⁶ Clearly the plaintiff has complied with the discovery requirements for obtaining a continuance. 7547 Corp. v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 220 (5th Cir. 1994). Upon due consideration, the court finds that the plaintiff should be granted a continuance of the summary judgment proceeding pending the completion of depositions.⁷

Conclusion

For the forgoing reasons, the court finds that the magistrate judge's January 8, 1997 order should be affirmed and the plaintiff's motion for a Rule 56(f) continuance should be granted.⁸

⁶As noted **supra**, the magistrate judge's January 15, 1997 order continued the plaintiff's deposition pending the completion of the defendants' court-ordered disclosure and production.

⁷The parties must seek any necessary amendment of the scheduling order from the magistrate judge.

⁸On January 17, 1997, the defendants filed an objection to and appeal of the magistrate judge's January 15, 1997 order continuing the plaintiff's deposition pending production by the defendants of "all appropriate documents." The plaintiff asserts that this appeal is moot since she has agreed to go forward with her

The parties' counsel will be directed to advise the court upon completion of the depositions pursuant to issuance of a briefing schedule.

An order will issue accordingly.

THIS, the _____ day of March, 1997.

NEAL B. BIGGERS, JR
UNITED STATES DISTRICT JUDGE

deposition. See Plaintiff's addendum to response to defendants' objection to and appeal of the magistrate judge's January 8, 1997 order (n.1).